

Andre L. Phillips,)
)
 Movant,)
 vs.) No. 94-0033-01-CR-W-FJG
 United States of America,)
)
 Respondent.)

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a claim involving

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255.

The pending motion is silent on newly discovered evidence. Instead, movant argues that the recent Booker ruling should be retroactively applied to his sentence.

For a new rule to be retroactive to cases on collateral review for purposes of a § 2255 petition, the Supreme Court itself must make the rule retroactive. Tyler v. Cain, 533 U.S. 656, 662-63 (2001). “When the Supreme Court makes a rule retroactive for collateral-review purposes, it does so unequivocally, in the form of a holding.” In re Anderson, 396 F.3d 1336 (11th Cir. 2005). In this regard, the Court agrees with the 11th Circuit that “[r]egardless of whether Booker established a ‘new rule of constitutional law’ . . . the Supreme Court has not expressly declared Booker to be retroactive to cases on collateral review.” Id. “Put simply, Booker itself was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a case on collateral review.” Id. Accordingly, because movant fails to make a *prima facie* showing of either of the grounds for collateral review under § 2255, his petition for relief must be dismissed.

For all the reasons stated above, it is hereby

ORDERED that movant’s writ of error audita querela (Doc. #106), filed April 25, 2005, is denied.

/s/Fernando J. Gaitan, Jr.
United States District Judge

Dated: June 16, 2005
Kansas City, Missouri